Supreme Court, U.S.
FILED
071179 MAR 11 2008
OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

IN RE RICHARD JOHN FLORANCE, JR.,
Defendant-Relator-Relator.

(from STATE OF TEXAS v. FLORANCE)

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ORIGINAL PETITION FOR A WRIT OF MANDAMUS

WITH APPENDIX A

RICHARD JOHN FLORANCE, JR.
1908 VASSAR DRIVE
RICHARDSON, TEXAS 75081

Questions Presented for Mandamus

Due Process—Compelled Consent

1. May a party be compelled to accept magistrate participation?

2. Is the trial court estopped from allowing magistrate participation?

3. Does the unauthorized magistrate have authority to rule on anything, especially the motions to strike those unauthorized "orders"?

STATUTORY CHALLENGES

4. Do 28 U.S.C. § 636(a), (b), or (c) violate Due Process?

E.D. Tex. Local Rules

5. Does CV-72 violate Due Process?

6. Does "App. B" Rule 1(G) violate Due Process?

7. Does "App. B" Rule 2 violate Due Process?

Mandamus

8. Is mandamus the remedy by which to cure illegal participation by an unauthorized magistrate?

9. Is the duty to vacate clear and non-discretionary?

Parties

The mandamus sought is directed to **SCHNIEDER**, with the federal trial court in Sherman.

Defendant, Relator, Relator

RICHARD JOHN FLORANCE, JR.
Richardson, Texas

Respondent

SCHNEIDER
UNITED STATES DISTRICT COURT
Eastern District of Texas, Sherman Division

Hence, the Solicitor General's Office

Additional Respondents

BUSH (unauthorized magistrate)
MALAND (Clerk)
UNITED STATES DISTRICT COURT
Eastern District of Texas, Sherman Division

STATE OF TEXAS

Hon. GREG ABBOTT
Attorney General

JOHN R. ROACH, DA
JOHN R. ROLATER, JR., Chief, Appellate Div.
ANDREA L. WESTERFELD
Collin County DA's Office

Petition for a Writ of Mandamus

RJF petitions for a writ of mandamus to the federal trial court as follows:

Citations to decisions below

None.

Basis for Jurisdiction

(i) Date Order To Be Reviewed Was Entered
[3] Unsigned "order" of "referral": undated
[17-1] M/Sanctions denied: 26 Nov 2007
[20-1] 1st M/Strike denied: 13 Dec 2007 [+90: 12 Mar 2008]
[22-1] Rpt/Recommend'n by the unauthorized magistrate: 15 Jan 2008 [+90: 14 Apr]
[27-1] "Order" (Supp. Rpt/Recmnd'n): 6 Feb 2008 [+90: 6 May]
[28] 2d M/Strike denied: 6 Feb [+90: 6 May]

(ii) Rehearing, Extension
Mandamus, federal appellate court, No. 08-40198. Dismissed: 5 March [+90: 3 Jun]

(iii) Rule 12.5 N/A

(iv) Statutes, Jurisdiction
28 U.S.C. § 1651(a).

(v) Regarding notice of statutory challenge, Rule 29.4(b)
28 U.S.C. § 2403(a) may apply. No court has certified any issues to the Attorney General.

Non-Argument Calendar Preferred

Oral argument is not expected to aid in the resolution of these issues.

Statement of the Case

Trial court jurisdiction

28 U.S.C. §§ 1333(1), 1331 via § 1441.

Compelled consent to magistrate participation

Brief procedural history.

RJF Removed the "criminal" case that arose from the record-setting criminal retaliation spree spearheaded by DAVIS. No. 4:06-CV-510 (E.D. Tex.). In both the original and amended Notices of Removal, RJF asserted very clearly his objection to any and all magistrate participation.

Originally, the federal trial court used a clerical "notice of deficiency" as the Remand "order". The federal appellate court vacated that nonsense, reinstating the Removal. No. 07-40130. Key, the appellate court simply ruled on the case. Thus, first time through, while the "no access" policy existed, the appellate court waived it.

Also key, the *judge*, ***not*** the unconsented-to magistrate, entered that Remand "order". Thus, it was clear from the outset that RJF's objection to any and all magistrate participation had been both recognized and "granted". However, after reinstatement, ***all*** "rulings" have been by the unauthorized magistrate, despite RJF's objections.

In the Northern District of Texas, the *judge*, ***not*** the unconsented-to magistrate, ruled on RJF's motions to strike. No. 3:07-CV-125. But here, the

unauthorized magistrate "ruled" on RJF's motions to strike. [20-1], [28]. Also, the Northern District ***finally*** applied the law. No. 3:07-CV-1634. So, the appellate court not only refuses to rule, but also refuses to resolve a conflict between its own districts.

Collateral order doctrine.

Appeal or mandamus? Since the unauthorized magistrate's "rulings" are void, mandamus seems more appropriate. Either way, it's all pre-"final judgment". The issue of unauthorized magistrate participation is moot if it's not addressed now. Presume another unlawful Remand. Appeal of Remand is certainly possible, No. 07-40130, but it's not the standard expectation. And, since RJF has every expectation of prevailing in the state system, control of review all the way back up to this Court is in STATE's hands, not RJF's. Moreover, where STATE's motion for Remand is denied, dismissal will follow very shortly thereafter. Again, control of the appeal would be out of RJF's hands.

Argument

Due Process—Compelled Consent

1. May a party be compelled to accept magistrate participation?

"Judges" v. "magistrates".

What is a "court of the United States"? It's a human being endowed with 28 U.S.C. §§ 1330-1369 (Chapter 85) jurisdiction. Key, a "court" retains that jurisdiction "during good behavior". § 451.

So, "court" means "judge". Further, "court" *can't* mean "magistrate". "Magistrates" hold office for specific terms. § 631(e).

Alternative processes.

Options abound. Decision-making authority exists in arbitrators, mediators, and even clerks. But, in exactly the same way as with "magistrates", that authority arises by one and only one mechanism: consent of the parties. *Cf.* § 636(a), (c).

Consent cannot be compelled.

Compelled consent violates Due Process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985) (*Rudzewicz*); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (limiting "in person" solicitation; thus, limiting duress, coercion, and undue influence engaged in by the legal profession); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (regarding "by mail" solicitation and other forms of legal services advertising); *Garcetti v. Ceballos*, __ U.S. __ 125 S. Ct. 1951 (2006) (professional ethics still matter).

The "who decides" issue.

The parties decide the question of magistrate participation; ***not*** the legislature, ***or*** the executive, ***or*** the judiciary.

2. Is the trial court estopped from allowing magistrate participation?

The "judge" entered the first "ruling". The unauthorized magistrate didn't participate until *after* reinstatement. No formal retraction of that original "granting" of RJF's objection exists. *New Hampshire*

v. Maine, 532 U.S. 742 (2001) (judicial estoppel; applies to parties; reasonable extension applies this to the trial court).

3. Does the unauthorized magistrate have authority to rule on anything, especially the motions to strike those unauthorized "orders"?

Obviously, where the magistrate is unconsented-to, the magistrate has no authority at any time for any reason. But, where the magistrate participation issue is "at issue", the Northern District applied the more sensible policy. The judge, not the magistrate, ruled on RJF's motions to strike. *Cf.* § 636(c)(4).

STATUTORY CHALLENGES

4. Do 28 U.S.C. § 636(a), (b), or (c) violate Due Process?

The statutes aren't the problem.

RJF doesn't find anything wrong with the statutes. The problem is in the application. They are misread to include the authority to compel consent, *but see Rudzewicz*, 471 U.S. at 486, and to deny access, *but see Boddie v. Connecticut*, 401 U.S. 371 (1971), thus to exclude the indispensable condition precedent of unanimous party consent.

E.D. Tex. Local Rules

5. Does CV-72 violate Due Process?

What saves the federal statutes, § 636, from the obvious Due Process problems of compelled consent and denial of access is the condition precedent of consent. CV-72 is no different. Where one reads CV-72 as saying, "no additional limitations are added", CV-72 is fine.

However, since the App. B. rules don't recognize the indispensable condition precedent, CV-72 is directly compels consent and denies access. Local Rules may not violate rights. *Ballard v. Comm'r*, 544 U.S. 40 (2005).

5. Does "App. B" Rule 1(G) violate Due Process?

Automatic referral is a flagrant violation.

Rule 1(G) implements a standing policy of compelled consent and denial of access.

Pro se's discriminated against as a class—***all*** parties are compelled to consent.

In addition to the mere concept of "automatic referral", which runs roughshod over the indispensable condition precedent, there's the systemic distinction between "represented" parties and *pro se*'s. A "represented" party ***may*** choose, but a ***pro se may not!*** *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (race-neutral statute enforced by unequal policy (against Chinese) violates Equal Protection); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)

(intentional, irrational, reproducible governmental action; "class of one" recognized); *Roe v. Wade*, 410 U.S. 113 (1973) (treating the principal differently from the conspirators, as in excluding the principal completely, renders the statute void).

The boomerang effect of this facially discriminatory policy is that ***all*** other parties to that case are ***also*** compelled to consent.

This is the policy incorporated into CV-72, by its own language, which jeopardizes CV-72, as well.

6. Does "App. B" Rule 2 violate Due Process?

"Assignment" v. "referral".

Assignment is a purely administrative matter. *Assigning* a magistrate to a case is a "consent-neutral" event. A party might not even have standing to challenge the *assignment* process. But, this policy doesn't just *assign*. This policy *assigns* ***and*** *refers* at the same time. That *combination* subjects the *assignment* to Due Process analysis, as well.

Mandamus

7. Is mandamus the remedy by which to cure illegal participation by an unauthorized magistrate?

Since the "orders" are void, application of the collateral order doctrine for *appeal*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), just doesn't get us there. There's no "final decision"; all "orders" are void.

8. Is the duty to vacate clear and non-discretionary?

Where the duty to vacate a *judge's* "order" exists, there's all the more reason to expect a duty to vacate an *unauthorized magistrate's* "order". *Cf. Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976); *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (lack of subject matter jurisdiction produces void judgment); Rule 12(b)(1).

Remedies Requested

Given the foregoing, RJF requests

1. That this Court assert its supervisory authority in aid of its appellate jurisdiction;
2. That this Court grant RJF's motions to strike thereby vacating all documents submitted by the unauthorized magistrate;
3. That this Court declare the identified Local Rules void;
4. That this Court order the federal appellate court to refund RJF's filing fee and the cost of preparing and serving those mandamus petitions;
5. That this Court order the federal appellate court to pay RJF $5,000 in sanctions for its manifestly bad faith, purely dilatory, facially frivolous ruling;
6. The non-argument calendar;
7. Costs; and
8. Any and all other relief at law, in equity or sui generis to which he may show himself justly entitled.

Respectfully submitted,

/s/ Richard John Florance, Jr.
Richard John Florance, Jr.

Verification

Per 28 U.S.C. § 1746, under the penalty of perjury, I, Richard John Florance, Jr., depose and declare (or certify, verify or state), that I am at least 21 years of age, that I am competent to make this Affidavit, that I have personal knowledge of these facts, and that these facts are true and correct.

The facts stated in this Petition for a Writ of Mandamus are true and correct.

Further, Declarant sayeth not.

Executed on this the _____ of March, 2008

/s/ Richard John Florance, Jr.
RICHARD JOHN FLORANCE, JR., Declarant

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2008 March 5—Dismissal memo

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 5, 2008

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 08-40198 In Re: Florance
USDC No. 4:06-CV-510

The court has dismissed your petition for writ of mandamus as erroneously docketed. In accordance with the court's order of June 5, 2007, you can ask for permission to file within 15 days of this date.

Sincerely,
CHARLES R. FULBRUGE III, Clerk

By: */s/ Monica R. Washington*
Monica Washington, Deputy Clerk
504-310-7705

Mr Richard John Florance Jr

Rule 14.1(i)(ii)—Additional Orders

2007 Dec 13—Unauthorized magistrate—RJF's (first) m/strike denied

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS,	§	
Plaintiff,	§	
v.	§	CASE NO. 4:06cv510
RICHARD JOHN	§	
FLORANCE	§	
Defendants.	§	

ORDER

Now before the Court is Defendant Florence's Motion to Strike (Dkt. 19). Having reviewed the motion and the applicable authorities, the motion is DENIED. Defendant is expected to comply with this Court's November 26, 2007 order.

SO ORDERED.

SIGNED this 13th day of December, 2007.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

2008 Feb 6—Unauthorized magistrate—RJF's second m/strike denied

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

THE STATE OF TEXAS,	§	
Plaintiff,	§	
v.	§	CASE NO. 4:06cv510
RICHARD JOHN	§	
FLORANCE, JR.,	§	
Defendant. [1]	§	

ORDER

Now before the Court is Florance's (Second) Motion to Strike (Dkt. 25). The motion is DENIED. Magistrate judges are judges who are authorized by Congress to hear and determine those pretrial matters referred to them, regardless of the consent of the parties. *See* 28 U.S.C. § 636(b). The District Judge has made such a referral here. *See* Dkt. 3. The Court refers Defendant to 28 U.S.C. § 636 and this Court's local rules for the established procedures for parties to object to or seek reconsideration of the specific findings and rulings of magistrate judges.

SO ORDERED.

SIGNED this 6th day of February, 2008.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

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[1] [N.B. *See* n.2, *infra*. *RJF*]

2006 June 29—Trial court—"assignment" and "referral" (undated, unsigned)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

MAGISTRATE REFERRAL

Civil Action No. 4:06cv510

State of Texas
v.
Richard John Florance, Jr

Pursuant to a Standing Order, certain civil suits are referred at the time of the filing equally among magistrate judges. Therefore, the above-entitled action has been referred to:

Magistrate Judge Don D Bush

2007 Nov 26—Unauthorized magistrate—RJF's m/sanctions denied

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS,	§	
Plaintiff,	§	
v.	§	CASE NO. 4:06cv510
RICHARD JOHN	§	
FLORANCE	§	
Defendants.	§	

ORDER

Now before the Court is Defendant Florence's Motion for Sanctions (Dkt. 16). The motion for sanctions is denied. There is nothing before this Court to indicate that sanctions under Federal Rule of Civil Procedure 11 are justified here. Courts evaluate an attorney's compliance with Rule 11 using an objective standard of reasonableness under the circumstances. *Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 873 (5th Cir. 1988). The Court finds that Plaintiffs counsel acted reasonably in filing the motion to remand and does not believe that any representations made regarding Defendant or his removal were made in bad faith or for the purpose of harassing Defendant. *See generally* FED. R. CIV. P. 11(b). Therefore, no sanctions will be awarded.

Further, the Court notes that Defendant's pleadings make numerous references to counsel for the State of Texas, Andrea Westerfeld, as if she, rather than the State, were a party to this suit.

Defendant has referred to Ms. Westerfeld as a "liar" and "egregiously inept," among other personal attacks. Such references are inappropriate and unnecessary, and this Court will not permit or tolerate any further personal references to Plaintiff's counsel in Defendant's pleadings. While Defendant is [1 2] *pro se*, he is not absolved of the expectation that all individuals appearing before this Court should act professionally and courteously. Additionally, the Court cautions Defendant to respond to the merits of the opposing party's pleadings, rather than provide this Court with critiques of opposing counsel's writing style or intelligence. The Court is capable of evaluating such issues – as to all parties – without Defendant's assistance.

Additionally, Plaintiff's motion to remand and Defendant's response are currently under the Court's consideration, along with Defendant's motion to dismiss. The Court notes that Defendant has, to date, failed to comply with Local Rule CV-81(c)(2) of the Local Rules of the United States District Court for the Eastern District of Texas, requiring the removing party to furnish to the clerk at the time of removal a certified copy of the state court docket sheet as well as a copy of all pleadings that assert causes of action, all answers to such pleadings and a copy of all process and orders served upon the party removing the case to this Court. Defendant is ordered to file copies of such materials with the Court on or before ***December 12, 2007***.

Until the Court rules on either the motion to remand or motion to dismiss, no additional pleadings or dispositive motions shall be filed, absent leave of

Court.

SO ORDERED.

SIGNED this 21st day of November, 2007.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

2008 Jan 15—Unauthorized magistrate—Report and Recommendations

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS,	§	
Plaintiff,	§	
v.	§	CASE NO. 4:06cv510
RICHARD JOHN	§	
FLORANCE,	§	
Defendant.	§	

REPORT AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE JUDGE

[Content is of Record. This entry, incomplete without the objections, which are also of Record, exists for completeness, illustrating the extent of the

participation by the unauthorized magistrate.]

SIGNED this 15th day of January, 2008.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

2008 Feb 6—Unauthorized magistrate—First supp. to his report and recommendations

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

THE STATE OF TEXAS,	§	
Plaintiff,	§	
v.	§	CASE NO. 4:06cv510
RICHARD JOHN	§	
FLORANCE, JR.,	§	
Defendant. [2]	§	

ORDER

[This is not an order. It's a supplement to the report and recommendations, responsive to RJF's

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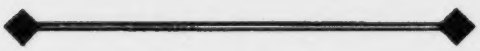
[2] [N.B. This is the unauthorized magistrate's first case style that is correct in all the particulars regarding RJF. *RJF*]

initial objections. The content and RJF's related objections are both of Record.]

SO ORDERED.

SIGNED this 6th day of February, 2008.

/s/ Don D. Bush
DON D. BUSH
UNITED STATES MAGISTRATE JUDGE



Rule 14.1(i)(iii)—Any Rehearing

No (other) rehearing sought or granted.

Rule 14.1(i)(iv)—Judgment of different date

None.

Rule 14.1(i)(v)—Statutes and Rules

Relevant Statutes

28 U.S.C. § 451 Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are ***entitled to hold office during good behavior***. ...

The term "judge of the United States" includes judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are ***entitled to hold office during good behavior***.

28 U.S.C. § 451 (2000) (emphasis added).

28 U.S.C. § 631(e) (Appointment and Tenure)

(e) The appointment of any individual as a full-time magistrate judge shall be for a ***term of eight years***, and the appointment of any individuals as a part-time magistrate judge shall be for a ***term of four years***, ...

28 U.S.C. § 631(3) (2000) (emphasis added).

28 U.S.C. § 636(a), (b), (c) (Jurisdiction, powers, and temporary assignment)

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which ***the parties have consented***.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may ***designate*** a magistrate judge to hear and determine any pretrial matter

pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also ***designate*** a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those

portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may ***designate*** a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may ***designate*** a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be ***assigned*** such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon ***the consent of the parties***, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and

order the entry of judgment in the case, when specially ***designated*** to exercise such jurisdiction by the district court or courts he serves. Upon ***the consent of the parties***, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631 (b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, ***designation*** under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is ***designated*** to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, ***notify the parties of the availability of a magistrate judge*** to exercise such jurisdiction. ***The decision of the parties*** shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again ***advise the parties of the availability of the magistrate judge***, but in so doing, ***shall also advise the parties that they are free to withhold consent without adverse substantive consequences.*** **Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.**

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. ***The consent of the parties allows a magistrate judge <u>designated</u> to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure.*** Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a ***<u>reference</u>*** of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

28 U.S.C. § 636(a), (b), (c) (2000). *See also* Cornell LII (current as of 6 March 2008).

N.B. "Designate" means "to make administrative assignment". "Reference" means an actual "referral". "Consent" means "consent", as in "voluntary".

Local Rules, E.D. Tex.

CV-72 Magistrate Judges.

Powers and Duties of a United States Magistrate Judge in Civil Cases.

The powers and duties of a United States magistrate judge serving within the Eastern District of Texas shall be governed by the Local Rules of Court for the ***Assignment*** of Duties to United States Magistrate Judges adopted by this court. See Appendix B. Nothing in this rule shall be construed to limit the jurisdiction of a United States magistrate judge serving in the Eastern District of Texas acting pursuant to powers directly conferred by act of Congress or applicable rule.

E.D. CV-72 (emphasis added).

"Appendix B"—Rule 1(G).

(G) Non-Prisoner Pro Se Cases.

All non-prisoner pro se cases are ***automatically referred*** to a magistrate judge for preliminary proceedings.

The parties may consent to trial by the magistrate judge pursuant to 28 U.S.C. Section 636(c).

E.D. "App. B" R. 1(G) (emphasis added).

"Appendix B"—Rule 2.

RULE 2. ASSIGNMENT OF MATTERS TO MAGISTRATE JUDGES

(A) General.

The ***method for assignment*** of duties to a magistrate judge and for the allocation of duties among the several magistrate judges of the court shall be made in accordance with orders of the court or by special ***designation*** of a district judge.

(B) Misdemeanor Cases.

All misdemeanor cases shall be ***assigned***, upon the filing of an information, complaint, or violation notice, or the return of an indictment, to a magistrate judge, ***who shall proceed*** in accordance with the provisions of 18 U.S.C. Section 3401, and Rule 58 of the Federal Rules of Criminal Procedure.

(C) Policy.

Nothing in these rules shall preclude the court, or a district judge, from reserving any proceeding for conduct by a district judge, rather than a magistrate judge. The court, moreover, may by order modify the ***method of assigning proceedings*** to a magistrate judge as changing conditions may warrant.

E.D. "App. B" R. 2 (emphasis added).

Rule 14.1(i)(vi)—Additional Essential Materials

Reference to the Record is adequate.